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FILED
FEB 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1134

IN THE

Supreme Court of the United States

October Term, 1988

LESTER W. SMITH and WESTERN RESERVE GROUP, INC.,
Petitioners,

vs.

COMBUSTION ENGINEERING, INC., C-E CAST EQUIPMENT, JAMES F. CALVERT, GEORGE E. FISHER, JR., LAWRENCE K. HUBBELL, EDWIN M. KAVANAGH, JAMES B. KELLY, JAMES E. KLIMA, THOMAS E. McGRANAHAN, WILLIAM FRANCIS ROCHE, ARTHUR F. SANTRY, JR., and FG DOE, EN ROE and JB LOE,
Respondents.

RULE 22.6 SUPPLEMENTAL BRIEF FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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15 pp

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TWO RECENT DECISIONS OF THIS COURT ARE APPLICABLE TO THE DECISION OF THE COURT OF APPEALS

Part II of the judgment of a panel of the Sixth Circuit, filed August 24, 1988 (Pet. App. A3-A5), which affirmed all judgments of the District Court which were appealed, speaks to the question of a one-year time bar retroactively applied against the First Count of petitioners' Complaint in a district court against all respondents.

In excerpt, the Court of Appeals for this case has said:

* * * * *

II

> The district court granted the defendants' motion to dismiss the civil rights claim, brought pursuant to §1983, on the basis of limitations***.
>
> Applying *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986), the district court held that the civil rights action was time barred***.
>
> * * * * *
>
> ***As the *Mulligan* court pointed out, Ohio's catch-all four-year statute of limitations, Ohio Rev. Code §2305.09(D)[1], does not apply to §1983 actions. 777 F.2d at 343 n.4.

The petition for No. 88-1134 was filed January 7, 1989.

The full and unanimous decision of this Court in *Owens v. Okure*, _____ U.S. _____ (1989), No. 87-56, 57 L.W. 4065, was announced January 10, 1989.

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[1] Please see Pet. App. A135 for O.R.C. §2305.09(A), (B) and (D).

The grant of certiorari—summary disposition order of this Court in *Thomas v. Shipka*, _____ U.S. _____ (1989), No. 87-1384, 57 L.W. 3486, was handed down January 23, 1989.

The combined result of these two decisions was an immediate mandate for the Sixth Circuit Court of Appeals (and all federal district courts in the State of Ohio) to no longer automatically apply, retroactively or otherwise, the one-year time bar *Rule* judicially created by the Court of Appeals in *Mulligan v. Hazard*, 777 F.2d 340 (CA6 1985).

In November of 1985, petitioners sought to invoke the four-year statute of limitations provided by Ohio law[2]: "[W]hich applies to certain torts including trespass, theft, fraud and any other torts not otherwise provided for by other sections[8]", *Thomas v. Shipka* (II) 829 F.2d 570, at 574 (CA6 1987).

Although the judgment of Sixth Circuit in *Thomas v. Shipka* (II), *supra*, has just been vacated by summary action, the quotation from that decision in the paragraph next above confirms that at least a few of the circuit judges knew about the four-year time bar of Ohio Revised Code §2305.09. After *Wilson v. Garcia*, at least a majority of the circuit judges appeared as comfortable with the "docket clearing" one-year time bar of another Ohio Revised Code Section.[3] Now, since January 23,

[2] Complaint ¶2. "This action is timely filed by virtue of Title 15 U.S.C. §15b and Ohio Revised Code §2305.09 (four year statutes of limitation)." Pet. App. A109.

[3] If the Court should determine to grant certiorari in No. 88-1134 and accept petitioners' case for full hearing and oral argument, signatory counsel would attempt to provide the court with a survey of Sixth Circuit/Ohio district court §1983 cases with prima facie merit claims forever lost because of *Mulligan v. Hazard*. One immediate example is

(Footnote continued on following page.)

1989, all of the circuit judges have been mandated by this Court to select and apply "a residual statute for all other personal injury actions", *Owens v. Okure, supra*, _____ U.S. at _____, 57 L.W. at 4066.

Choosing a balance point between Court time available for argument and full opinion and fair and equitable summary disposition for the Petition question of a one-year time bar retroactively applied against the First Count of petitioners' Complaint, petitioners should and do now pray for a vacation of Part II of the Sixth Circuit judgment of August 24, 1988, with instructions to remand to a district court for plenary trial on the merits of each of petitioners' multiple claims in the First Count of the Complaint for this case.

(Footnote continued from preceding page.)

Vodila v. Clelland, 836 F.2d 231 (CA6 1987), where on December 28, 1987, plaintiff's case was denied plenary trial on the merits despite the action taken by this Court June 26, 1987 in *Vodila v. Clelland* (No. 86-700), _____ U.S. _____, 107 S.Ct. 3255, 97 L.Ed. 754 (1987). Signatory counsel also comments that a survey of Sixth Circuit/Ohio district court cases after *Mulligan v. Hazard* will not be complete because of the "Not Recommended For Full-Text Publication" procedures of the Sixth Circuit. Regrettably, it is apparent to signatory counsel that many Ohio district court cases involving *Mulligan v. Hazard* have also not been published.

TWO EARLIER BUT STILL RECENT DECISIONS OF THIS COURT CONTINUE TO BE APPLICABLE TO THE DECISION OF THE COURT OF APPEALS

The facts of petitioners' case against respondents bring forth the common law based issues of "trade secret" and "abuse of process" for review in light of *Patrick v. Burget*, 486 U.S. _____, 108 S.Ct. 1658, 100 L.Ed. 2d 83 (1988) and, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. _____, 108 S.Ct. 1931, 100 L.Ed. 2d 497 (1988). Determination of these two common law issues is necessary to answer the second broad question initially presented for review: [I]s conspiratorial anticompetitive and monopolistic conduct shielded from federal antitrust law review by the *Noerr-Pennington* doctrine? (Pet. p. I)

As a matter of competitive edge, many businesses now elect to protect commercially valuable information through reliance upon a state law of *trade secret* protection. *Kewanee Oil Co. v. Bicron Corp.*[4], 416 U.S. 470 (1974), which establishes that neither the Patent Clause of the United States Constitution nor the federal patent laws pre-empt state *trade secret* protection for patentable or unpatentable information, may well have increased the extent of this reliance.

The decision of the Court in *Aronson v. Quick Point Pencil Company*, 440 U.S. 257 (1979), reaffirmed *Kewanee Oil, supra*, and further held that federal patent law is not a barrier to a contract by which someone agrees to pay a continuing royalty in exchange for the disclosure of a *trade secret* concerning a product.

[4] *Kewanee Oil* reached this Court from federal courts in the Sixth Circuit and involved both Ohio case law on definition of "trade secret" and the same Ohio statutes (Ohio R.C. 1333.51(C) and 1333.99(E)), chosen by the Combustion Engineering respondents, and/or the private investigator Niam and the Cleveland law firm Arter & Hadden, to spearhead the criminal prosecution phase conducted by County Prosecutor FG Doe intended to wipe out or totally destroy the petitioners as relevant market competition.

For petitioners' case against respondents, it has been determined as "true facts", by investigation and by discovery deposition and by unchallenged assertion to the courts below, that Combustion Engineering, the "established firm", is *without patents, trademarks, copyrights or bonafide trade secrets to support a civil action in federal or state court.*

As petitioners have just said to this Court over the signature of their counsel of record, Pet. p. 23, in repetition of what was said to the Court of Appeals below,—*When the state grand jury indicted, there were mere allegations of several crimes which can be shown at a plenary trial on the merits as having been capable of no reasonable proof. At trial, a false assertion by the Combustion Engineering defendants of trade secrets will be shown as yet another form of antitrust violation*—: Pet. App. A74.

The interface of the petition for No. 88-1134, with the second common law evidentiary issue, *abuse of process,* has been presented as Question 2, Pet. p. I, and preliminarily briefed, Pet. pp. 18-20, under the argument caption—

> The Courts Below Were Wrong In Refusing To See That The Tort Of "Abuse Of Process", Not "Malicious Prosecution", Was The Appropriate Objective Test For Evaluating Respondents' Conduct In Resorting To State Court Prosecution Until Petitioners Pled Guilty.

Resolution of the state law evidentiary issues of *trade secret* and *abuse of process* for answer to the federal law question of expanded *Noerr-Pennington* immunity should and does now require vacation of Part III of the Sixth Circuit judgment of August 24, 1988 (Pet. App. A5-A8), with instructions, including remand to a district court for plenary trial on the merits of all claims in the Second and Third Counts of the Complaint for this case.

RECENT DECISION FROM FIRST CIRCUIT APPLYING THIS COURT'S DECISION IN *ANDERSON v. CREIGHTON*

The decision of this Court in *Anderson v. Creighton*, 483 U.S. _____, 107 S.Ct. 3034, 97 L.Ed. 523 (1987) has not been cited to the Sixth Circuit by petitioners. This decision has become relevant to petitioners' case before this Court in light of a very recent decision of the United States Court of Appeals for the First Circuit: *Unwin v. Campbell*, 863 F.2d 124 (CA1 1988) (44 Cr1 2240).

Unwin v. Campbell appears to stand for a proposition of federal law that an appeals court must consider undisputed facts revealed during discovery when reviewing a defendant's claim for entitlement to an immunity defense.

Unwin was dealing specifically with defendants who were state and local police officers claiming immunity from damages in a prison inmate's action against them under 42 U.S.C. 1983. An interlocutory appeal had been granted from the district court's denial of defendants' motions for summary judgment on grounds of qualified immunity. Relevant to the petition for No. 88-1134, the *Unwin* general proposition that an appeals court must consider undisputed facts revealed during discovery when reviewing a defendant's claim for entitlement to an immunity defense appears to be applicable.

The Sixth Circuit judgment of August 24, 1988 (Pet. App. A1-A8) makes no reference to any matters outside the pleadings which could have lead to reversal of any of the multiple opinions, judgments and orders of the district court which were appealed.

The Joint Appendix to Sixth Circuit for Appeals No. 86-3378 and No. 86-3657 (and No. 87-3761) included two "smoking gun" letters obtained by petitioners' discovery from the office files of Niam Investigations and addressed to respondents Kelly and Roche. For these two letters, and six other letters exchanged between conspirators during days in 1984 following the misdemeanor conviction of petitioner Smith produced by state court prosecution under state trade secret felony theft law, see Pet. App. A162-A173. The discovery also included a letter originated by respondent Hubbell and sent to a management person of respondent C-E Cast Equipment requesting a payment of legal fees for defending against petitioners' claims in the Complaint: Pet. App. A174-A175. At oral argument, the Sixth Circuit was shown discovered Exhibit 12 (as described in detail by Pet. p. 12 and n. 13).

In preparing the petition for No. 88-1134, there was clear Sixth Circuit precedent for the argument, Pet. pp. 21-22, under the caption—

> The Courts Below Were Wrong In Not Expecting Or Requiring Testimonial Or Affidavit Evidence From Respondents Or Their Attorneys That Any Or All Of Them Were Acting In "Good Faith" When Seeking Out The Participation Of A State Prosecutor Or The Prosecutor's Office For Further Actions Of Anticompetitive Conduct Creating Monopoly Power.

However, until *Unwin v. Campbell*, there was no clear precedent from any court of appeals for arguing to this Court that the courts below were wrong in not evaluating the evidentiary weight of petitioners' discovery documents when reviewing the right of all respondents to the shield from federal antitrust law review with the escutcheon of the *Noerr-Pennington* doctrine.

CONCLUSION

If the Court should determine by grant of certiorari—summary disposition order to vacate the judgment of the Court of Appeals filed August 24, 1988 in its entirety, and to remand with instructions as to petitioners' Second and Third Counts, including remand to a district court for plenary trial on the merits of each of petitioners' claims in all Counts, the Court may further determine that oral argument and immediate review is not required until after a district court trial and jury verdict on the state law and common law evidentiary issues of "trade secret" and "abuse of process" (and also "trespass to land", and "trespass to chattels" or "conversion").

Also, the Court would not need to now review and decide the important considerations presented for review including any conflict with the decisions of other federal courts of appeals on the same matters, or which could call for an exercise of this Court's power of supervision.

The Court need only decide that the Sixth Circuit Court of Appeals has decided important questions of federal law in a way in conflict with applicable decisions of this Court.

Respectfully submitted,

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